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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 786

THE BOARD OF THE COUNTY COMMISSIONERS OF THE COUNTY OF FREMONT, WYOMING; GEORGE C. McRAE, Treasurer of Fremont County, Wyoming; and ERNEST H. HARTMAN, Assessor of Fremont County, Wyoming,

Petitioners and Appellees Below,

vs.

UNITED STATES OF AMERICA,

Respondent and Appellant Below.

BRIEF OF AMICI CURIAE OPPOSING PETITION FOR WRIT OF CERTIORARI

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COCKLE PRINTING COMPANY, LAW BRIEFS, OMAHA

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I.

PRELIMINARY STATEMENT

The Shoshone Tribe of Indians of the Wind River Reservation in Wyoming respectfully states to the Court:

1. It is a tribe of Indians formerly and now in treaty relations with the United States and is a resident of the State of Wyoming. Its members occupy lands in

common and in severalty on the Wind River Reservation in Wyoming and the Tribe is the owner of an undivided half interest in the unallotted lands of said reservation.

2. The Shoshone Tribe formerly owned the whole of said reservation (Treaty of July 3, 1868, 15 Stat. 673, 2 Kappler 1020). In 1878 the United States wrongfully appropriated an undivided one-half of the reservation for the use of the northern Arapahoe Tribe of Indians (299 U. S. 476). In 1938 the Shoshone Tribe recovered judgment against the United States for over four million dollars for said appropriation (304 U. S. 111). This judgment was paid. Pursuant to the Act of Congress of July 27, 1939, 53 Stat. 1128, one million dollars of the Shoshones' money was made available to purchase privately owned lands, formerly a part of the reservation, and restore same to tribal use, title being taken by the United States as trustee for the tribes. The Shoshones loaned this money for the joint use and benefit of the two tribes.

3. The lands sought to be taxed by Petitioner herein are lands bought with the Shoshones' judgment fund money. The debt has not as yet been paid. Some of the lands so purchased are used by the Shoshone Tribe and its members and the remainder by the Arapahoe Tribe and its members. The Shoshone Tribe has a direct interest in the outcome of the cause.

4. George M. Tunison, Attorney at Law of Omaha, Nebraska, and Charles J. Kappler, Attorney at Law of Washington, D. C., are members of the bar of the Supreme Court of the United States, and represented the Shoshone Tribe in the recovery above mentioned. They

are, and for many years have been, attorneys for the said Shoshone Tribe, under contract approved by the Secretary of Interior and Commissioner of Indian Affairs. Said contract contains, among others, the following provision:

> "It shall be the duty of the attorney to counsel with, advise, and represent the tribe in connection with matters concerning its tribal property and funds, and any other matters affecting the rights and interests of said tribe. It shall be the duty of said attorney to advise and counsel with the tribe at their agency at Fort Washakie, Wyoming, and to represent the tribe before all Departments, tribunals, Committees of Congress, and other officers of the Government having any duty to perform in connection with the tribal affairs of the tribe at the request of the Shoshone Tribal Business Council."

5. Following the decision of this cause in the United States District Court for the District of Wyoming, the Shoshone Tribal Business Council, same being the official, elected, representative body of the Tribe, requested its attorneys, said Tunison and Kappler, to participate in its behalf in the further proceedings in said cause. The Shoshones believe that because of the familiarity of the Tribe's attorneys with the Treaties, Acts of Congress, and Executive Orders relating to said reservation, said attorneys may be of assistance to the Court in resolving the issues presented.

6. Upon the appeal to the United States Circuit Court of Appeals, Tenth Circuit, on application to the Court and leave granted, Messrs. Tunison and Kappler, as counsel for the Shoshone Tribe, filed a brief amici curiae and Mr. Tunison participated in the oral argument at Denver on September 7, 1944 (R. 39).

II.

OPINIONS OF COURTS BELOW

The opinion of the District Court of the United States for the District of Wyoming (R. 26-32) is reported in 53 F. Supp. 395. The opinion of the United States Circuit Court of Appeals for the Tenth Circuit (R. 39-44) is reported in 145 F. 2d 329.

III.

JURISDICTION

The judgment sought to be reviewed was entered October 10, 1944 (R. 44). Petition for Writ of Certiorari was filed December 27, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, 28 U. S. C. A. Sec. 347; also under the Act of July 27, 1939, 53 Stat. 1128, 25 U. S. C. A. Secs. 571-577.

IV.

STATEMENT OF THE CASE

The case is fairly stated in the opinion of the Circuit Court of Appeals (R. 39-41). Under Sec. 4 of Rule 27 of the Court further statement is unnecessary.

V.

ARGUMENT

1. Petitioner's Erroneous Concept.

The basic weakness in petitioners' argument is the failure to recognize that the Wind River Reservation is a treaty reservation; that the lands sought to be taxed are an integral, component part of that reservation; that the whole reservation, now restored to practically its size

prior to the 1905 cession, is an instrumentality of the United States used in the performance of its constitutional duty and treaty obligation and that the lands here involved are no more subject to taxation than original tribal lands never alienated from the reservation. Petitioners' whole argument revolves within the narrow orbit of a technical title in trust as exhibited in the common situation of guardian and ward or trustee and cestui que trust. Such is not the case.

The United States has a national, governmental interest in the functioning of the restored reservation; in preventing the alienation of any part thereof whether by tax sale or otherwise and in preserving it for the "absolute and undisturbed use and occupation" of the Indians pledged by the treaty. As this Court has held within the year, in United States v. Hellard (decided May 15, 1944) 88 L. ed. Adv. Op. 929:

> "This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust. Heckman v. United States, 224 U. S. 413, 437, 56 L. ed. 820, 830, 32 S. Ct. 424."

2. The Wind River Reservation is a Treaty Reservation.

Prior to 1871 the United States dealt with Indian Tribes through treaties. The fact and rule are stated in 31 Corpus Juris, Indians, as follows:

> Sec. 38. "Until the year 1871 the United States conceded to the Indian tribes the right to treat with the United States upon terms of national equality, and numbers of treaties were made in reference to lands, supplies, education, intercourse, and other

matters. The act of March 3, 1871, however, provided that no Indian nation or tribe within the territory of the United States should be acknowledged or recognized as an independent nation, tribe, or power, with which the United States might contract by treaty, it being further provided that no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to the date of the act, should be thereby invalidated or impaired."

Sec. 39. "A treaty with an Indian tribe has the same dignity and effect as a treaty with a foreign nation. It is a part of the law of the land, to be enforced by the courts, and cannot be disregarded by state legislation."

Numerous decisions of this Court established the above rule. The Wind River Reservation in Wyoming is one of the last of the treaty reservations.

3. The 1868 Treaty.

Prior to the Fort Bridger treaty of 1868 the Shoshone Tribe held under Treaty (18 Stat. 685, 2 Kappler, 848), 44,672,000 acres of land in Colorado, Utah, Idaho and Wyoming. Their right thereto was not disputed.

Upon the close of the Civil War the transcontinental railroads, authorized by act of Congress, were in course of construction from the Missouri River westward to the Pacific. They were obliged to cross vast tracts in possession of Indian tribes, one of such tracts being the above-mentioned Shoshone Treaty lands. To meet this situation Congress enacted the Indian Peace Commission Act of July 20, 1867 (15 Stat. 17). It was necessary under the land-grant to the Union Pacific Railroad to clear title to a strip of land through the heart of the Shoshone domain 40 miles wide and over 400 miles long.

The Peace Commission met with the Shoshones at Fort Bridger.

The United States did not "send boys to mill" as its treaty commissioners to the Shoshones. Nathaniel Green Taylor of Tennessee was a distinguished lawyer and Commissioner of Indian Affairs. John B. Henderson was a lawyer, United States Senator from Missouri and Chairman of the Senate Committee on Indian Affairs. John B. Sanborn, lawyer and soldier from Minnesota, was a brother of W. H. Sanborn, formerly Judge of the C. C. A. 8th Circuit and father of the present Federal Judge. These men well knew the force and effect, the legal and equitable import, of the words they placed in the Shoshone Treaty. The army members were Generals Sherman, Harney, Augur and Terry. They knew and respected Chief Washakie and the Shoshones and appreciated the invaluable assistance rendered in keeping open the Overland road. Henry M. Stanley accompanied the Commission as correspondent for the New York Tribune and the Missouri Democrat. There is every reason to believe that when this Commission sought and received from the Shoshones a cession of forty-four million acres of land they intended to and did vest in the Shoshones the absolute and undisturbed use and occupation of the three million acres granted in exchange.

When the Senate ratified the treaty and same was duly proclaimed, whereby there was vested in the Shoshones the "absolute and undisturbed use" of the lands forever, the United States had granted the greatest possible use consistent with retaining in the sovereign the title and authority requisite for its beneficent purposes

and constitutional duty in the administration of Indian affairs.

We quote from the opinion of this Court, by Mr. Justice Cardozo, in *Shoshone Tribe v. United States,* 299 U. S. 476-485:

> "By treaty of July 3, 1868 (15 Stat. 673), the Shoshone Tribe of Indians relinquished to the United States a reservation of 44,672,000 acres in Colorado, Utah, Idaho and Wyoming, and accepted in exchange a reservation of 3,054,182 acres in Wyoming, with other benefits not now important. The United States agreed that the territory described in the treaty now generally known as the Wind River Reservation, would be 'set apart for the absolute and undisturbed use and occupation of the Shoshone Indians . . . and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them.' Reinforcing this covenant, there was a solemn pledge of faith by the United States that no persons, except a few specially enumerated, and governmental agents engaged in the discharge of duties enjoined by law, should 'ever be permitted to pass over, settle upon, or reside' in the territory so reserved. The loyalty of the Shoshone tribe to the people of the United States has been conspicuous and unfaltering. A fidelity at least as constant and inflexible was owing in return."

Further in the opinion the Court stated, p. 496:

> "Confusion is likely to result from speaking of the wrong to the Shoshones as a destruction of their title. Title in the strict sense was always in the United States, though the Shoshones had the treaty right of occupancy with all its beneficial incidents. *United States v. Creek Nation,* 295 U. S. 103, 110."

4. The Constitution and Treaty. Supreme Law of the Land.

The Constitution of the United States provides, Art. VI:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land" . . .

The right of the Indians of the Wind River Reservation to the "absolute and undisturbed use" of their reservation lands, immune from State taxation, is guaranteed to them by the "supreme law of the land."

The Constitution also provides, Art. I, Sec. 8, Clause 3:

> "The Congress shall have Power to regulate commerce . . . with the Indian Tribes;"

In 31 Corpus Juris, Indians, Sec. 107, we find the rule:

> "Under the constitution of the United States, congress has the exclusive and unfettered power to regulate commerce with the Indian tribes. * * * The Indians and the territory which may have been specially set apart for their use are subject to the jurisdiction of the United States, and the power of congress to deal with Indians and their property is of the most sweeping character. * * * The power of congress is superior and paramount to the authority of the state within whose limits are Indian tribes. Such power does not cease when the Indians become citizens of the United States, when they become electors under state law, or when their lands are allotted in severalty."

The foregoing statement is supported by a long line of decisions of this Court. As was well stated in *United*

States v. Sandoval, 231 U. S. 28, 45; 58 L. ed. 107, 114, opinion by Mr. Justice Van Devanter (an acknowledged authority on Indian law):

> "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long-continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state. As was said by this court in United States v. Kagama, 118 U. S. 375, 384, 30 L. ed. 228, 230, 6 Supp. Ct. Rep. 1109: 'The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.' In Marchie Tiger v. Western Invest. Co., 221 U. S. 286, 315, 55 L. ed. 738, 749, 31 Sup. Ct. Rep. 575, prior decisions were carefully reviewed and it was further said: 'Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.'"

It is believed the foregoing sufficiently establish that the Wind River Reservation is an instrumentality employed by the United States, pursuant to the Constitution and Treaty, for the benefit and control of the Indians.

5. Reservation Lands are Immune from Taxation.

The rule is fairly stated in 51 American Jurisprudence, 1944, Taxation, Sec. 229:

> "As a general rule, lands in possession of an Indian tribe are exempted from taxation by a state, since such taxation would amount to the taxation of an instrumentality employed by the United States for the benefit and control of a dependent race."
>
> (Citing numerous decisions of this Court)

In Handbook of Federal Indian Law, U. S. Government Printing Office, 1942, under the subject State Taxation of Tribal Lands, p. 256, we find:

> "Lands which are occupied by a tribe or tribes of Indians have always been regarded as not within the jurisdiction of the state for purposes of state property taxation. The principal reason for this immunity has been the fact that the tribes have been regarded as distinct political communities exercising many of the attributes of a sovereign body."

The author quotes from The Kansas Indians, 5 Wall. 737, and the New York Indians, 5 Wall. 761, and later decisions of this court, illustrating the point that tribal reservations are federal instrumentalities. He concludes:

> "There seems little doubt in view of the foregoing that the validity, if not the scope, of the instrumentality doctrine, in so far as it relates to Indians, their property and their affairs, remains unchanged."

Little can be added to the authorities relied upon by the Court below in its opinion (R. 41-42), viz.:

"Article 4, Section 3, of the Constitution of the United States, vests in Congress the power of disposition of property belonging to the United States. Article 1, Section 8, authorizes Congress to enact all laws necessary and proper for carrying into execution all powers vested in the Government or in any department or officer thereof. And Article 6 provides that the laws of the United States enacted pursuant to the Constitution shall be the supreme law of the land, notwithstanding constitutions and laws of the states to the contrary. Manifestly Congress is vested with the absolute right to designate the persons to whom real property belonging to the United States shall be transferred, and to prescribe the conditions and mode of the transfer; and a state has no power to interfere with that right or to embarrass the exercise of it. Property owned by the United States is immune from taxation by the state or any of its subdivisions. Van Brocklin v. Tennessee, 117 U. S. 151, 6 S. Ct. 670, 29 L. Ed. 845; Irwin v. Wright, 258 U. S. 219, 42 S. Ct. 293, 66 L. Ed. 573; Lee v. Osceola Improvement District, 268 U. S. 643, 45 S. Ct. 620, 69 L. Ed. 1123; Mullen Benevolent Corp. v. United States, 290 U. S. 89, 54 S. Ct. 38, 78 L. Ed. 192; United States et al. v. Allegheny County, Pa., 322 U. S. 174, 64 S. Ct. 908. Congress may in its discretion waive the immunity and expressly consent that real or personal property belonging to the United States shall be subject to taxation under state authority. Mayo v. United States, 319 U. S. 441, 63 S. Ct. 1137, 87 L. Ed. 1504. But it has not done so in this instance.

"These lands were acquired with funds belonging to the Indians; and under section 6, supra, the title is held in trust for the Tribes. But the legal title is in the United States. Generally, the posses-

sion of the legal title by the United States determines the fact and right of ownership in respect of immunity from taxation under state authority. Wisconsin Railroad Co. v. Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. Ed. 687. And where the legal title is in the United States, lands are not subject to state or county taxes even though the United States holds them in trust for an Indian or a tribe. United States v. Rickert, 188 U. S. 432, 23 S. Ct. 478, 47 L. Ed. 532; McCurdy v. United States, 264 U. S. 484, 44 S. Ct. 345, 68 L. Ed. 801. In Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575, 48 S. Ct. 333, 72 L. Ed. 709, it was held that oil taken from restricted land of an Indian was subject to a production tax levied under state law. In Oklahoma Tax Commission v. United States, 319 U. S. 598, 63 S. Ct. 1284, 87 L. Ed. 1612, it was determined that a state may impose an inheritance tax upon the transfer of restricted land belonging to the estate of a deceased Indian, except as to land exempt from direct taxation. In United States v. Mummert, 8 Cir., 15 F. 2d 926, it was held that land purchased with restricted funds of an Indian is subject to county ad valorem taxes. And in United States v. Hester, 10 Cir., 137 F. 2d 145, it was determined that restricted but taxable land belonging to an Indian is subject to sale in accordance with state law to enforce collection of delinquent taxes. *But in all of those cases title to the land was in the Indian, not the United States.*" (Emphasis supplied.)

Perhaps it is as well to go back to the great landmark decision in *M'Culloch v. Maryland*, 4 Wheat. 316, 428-432, 17 U. S. 316, 424-432, 4 L. ed. 579, where Chief Justice Marshall in invalidating the tax sought to be imposed by the State of Maryland, said:

"When a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by

people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

"The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared."

M'Culloch v. Maryland is as good law today as it was in 1819. In United States and Mesta Machine Co. vs. County of Allegheny, decided by this Court May 1, 1944, 322 U. S. 174, 88 L. ed. Adv. Op. 845, 847, we find:

"Since 1819, when Chief Justice Marshall in the M'Culloch Case expounded the principle that properties, functions, and instrumentalities of the Federated Government are immune from taxation by its constituent parts, this Court never has departed from that basic doctrine or wavered in its application. In the course of time it held that even without explicit congressional action immunities had become communicated to the income or property or transactions of others because they in some manner dealt with or acted for the Government. In recent years this Court has curtailed sharply the doctrine of implied delegated immunity. But unshaken, rarely questioned, and indeed not questioned in this case, is the prin-

ciple that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation."

6. The Lands Taxed are a Part of the Indian Reservation.

The lands in question were formerly part of the Indians' treaty reservation. In 1904 the Reservation was thought to be larger than the Indians needed, resulting in a cession agreement and the Act of March 3, 1905, 33 Stat. 1016. Some of the ceded lands were eventually disposed of to white settlers and placed on the tax rolls of Fremont County (R. 26-27).

By far the larger part of the so-called "ceded portion" of the reservation remained unsold and was being used by the holders of the comparatively small acreage of sold lands along the watercourses. The Act of 1939 required the Secretary of Interior to restore these lands also to tribal ownership. The Indians had, throughout, remained the beneficial owners of these unsold lands. In the case of *Ash Sheep Company v. United States*, 252 U. S. 159, 64 L. ed. 507, the Court construed a similar agreement, made in 1904, relating to a like cession of lands on the Crow reservation in the adjoining state of Montana. The Court said:

> "Taking all of the provisions of the agreement together, we cannot doubt that while the Indians by the agreement released their possessory right to the government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made, any benefits which might be derived from the use of the lands would belong to the beneficiaries, and not to the trustee, and that they did not become 'public lands' in

> the sense of being subject to sale or other disposition, under the General Land Laws. * * * Thus, we conclude that the lands described in the bill were 'Indian lands' when the company pastured its sheep upon them, in violation of Sec. 2117 of Revised Statutes."

As time went on it became apparent that an error had been made and that the so-called ceded portions of the original reservation were needed by the United States for Indian use. Sale of lands on the ceded portion was discontinued in 1915. In the printed report of the Hearing before the Senate Committee on Indian Affairs on the Judgment Fund Act of July 27, 1939, 25 U. S. C. 571-577, we find, in the letter from the Secretary of Interior, to the Chairman of the Senate Committee, reporting on the pending Bill, S. 1878, the following:

> "The future of the Shoshone and Arapaho Tribes is in the livestock industry. Range is, of course, essential. Now there are intermingled Indian and non-Indian land holdings on the reservation. The Indians desire to consolidate their holdings in the vicinity of the communities in which they live. The non-Indians wish to do likewise. The provisions of this bill will permit a readjustment of land holdings to this end. The bill authorizes the creation of land-use districts, and the progressive consolidation of Indian and white holdings by districts. One of the main reasons for the creation of such districts is to facilitate an orderly acquisition for the Indians of the white-owned lands within the reservation. The Secretary of the Interior is authorized to restore to the Indians the ceded lands in any land-use district as soon as the white owners have been properly protected, as provided in section 5. Undisposed of ceded lands within land-use districts, if not under lease or permit to non-Indians, will be restored at once, but the ceded lands now used by permittees may be re-

> stored progressively only as non-Indian-owned lands are acquired by the United States for the benefit and use of the Indians. * * * The purchased lands will be used for the benefit of both tribes."

In the evidence at the Senate Committee Hearing on July 10, 1939, officially printed for use of the Committee, we find, pp. 7-8:

> "Senator O'Mahoney. What land is it proposed to purchase?
>
> "Mr. Zimmerman. It is proposed to purchase principally white-owned lands within the ceded portion of the reservation.
>
> "Senator O'Mahoney. In other words, it is proposed to repurchase for the Indians some of those lands which years ago the Indians ceded to the Government in trust for settlement by whites?
>
> "Mr. Zimmerman. That is correct. The lands that were purchased by the whites were, naturally, the best lands. I think that in some cases it is true that the water and the river bottom have been purchased by the white settlers, and they have used the rest of the ceded portion for grazing. The purchase of those white holdings was essential for proper use of the ceded area."

The picture is clear. White settlers came in, under the Act of 1905, settled upon and purchased a comparatively small acreage along watercourses. This gave them a distinct advantage in the use of adjoining range. In the meantime the Indian Office encouraged the development of the livestock industry among the Indians. Soon it was apparent the Indians needed all the land of the so-called ceded portion. As Senator O'Mahoney stated at the above hearing, p. 6:

> "When a portion of this reservation, known as the ceded portion, was yielded to the Federal Government by the Indians and opened to settlement, settlers came on and had the understanding that they would be permitted to graze their livestock on the reservation. Permits have been issued during a long period of years to these settlers. The livestock business of the Indians, however, has been fostered by the Indian Office and is being expanded. The result has been a gradual reduction in the number of authorizations for grazing permits, making it rather difficult for the settlers."

The recovery of the Shoshone Judgment Fund made available a sufficient sum of money with which to buy back the comparatively small amount of land which had been settled upon and patented. The United States agreed that as rapidly as these patented lands were bought back and restored to tribal ownership it would return to tribal ownership the remaining unsold lands within the respective districts (Sec. 5, Act of 1939). Congress specifically directed the Secretary of Interior so to restore said lands and the mandate is being progressively carried out.

It is apparent that the Act of 1939 was a comprehensive Act by which the United States in the performance of its constitutional duty and its treaty obligation undertook to prudently manage the more than four million dollars belonging to the Shoshones and representing the original reservation lands of which they had been wrongfully deprived. One may not read the hearings before the Senate Committee and the language of the Act and escape the conviction that the Interior Department and the Congress of the United States were functioning, in their respective constitutional spheres, to restore this

governmental instrumentality to a balanced working unit. Having so restored it, there is only one standard by which to measure the estate of the Indians in the restored reservation. That standard is the language of the 1868 treaty:

"absolute and undisturbed use and occupation."

7. The Interior Department Solicitor's Opinion of February 12, 1943.

In view of the pending return of the ceded portion to the reservation a question arose about jurisdiction to regulate hunting and fishing on what was formerly known as the ceded portion. Under date of February 12, 1943 Warner W. Gardner, Solicitor for the Department of Interior, rendered a scholarly opinion on the subject. While that opinion is not relied upon, in and of itself, as an authority in the instant case, and is no part of the record, yet the law is so clearly set forth therein that Amici Curiae are pleased to adopt same as a part of their argument herein and acknowledge their debt to the Solicitor for the able statement, viz.:

> "There are, however, special circumstances applicable to the Wind River Reservation that will complicate the problem of jurisdiction over hunting and fishing upon the ceded lands. Congress in 1939 enacted the Shoshone Judgment Act already mentioned. The act set aside $1,000,000 of the fund resulting from the judgment in *U. S. v. Shoshone Tribe*, 304 U. S. 111, for the acquisition of lands in the ceded as well as the diminished portion of the reservation. Land-use districts were to be established in both portions of the reservation, and the Secretary of the Interior was authorized under such rules and regulations as he might prescribe 'to effect the consolidation of Indian and privately owned lands within said districts' through a land acquisition program.

Title to all lands so acquired was to be taken by the United States in trust for the Shoshone and Arapahoe Tribes of Indians of the Wind River Reservation. The statute further directed the Secretary of the Interior 'to restore to tribal ownership all undisposed of surplus or ceded lands within the land-use districts which are not at present at lease or permit to non-Indians; and further to restore to tribal ownership the balance of said lands progressively as and when the non-Indian owned lands within a given land-use district are acquired by the Government for Indian use.'

"Although the Shoshone Judgment Act did not, in any technical sense, repeal the act of March 3, 1905, it arrested the process of alienating the ceded lands. The sale of the lands under this act of cession had already been indefinitely postponed by the departmental action of 1915. Moreover, unlike section 3 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 25 U. S. sec. 463 (a), which only authorized the Secretary of the Interior to restore to tribal ownership the remaining surplus lands of any Indian reservations 'if he shall find it to be in the public interest, section 5 of the Shoshone Judgment Act contained an express directive requiring the restoration of the vacant ceded lands. The program of reacquisition and restoration has already been fulfilled in large measure.

"So far as concerns the lands already restored to tribal ownership under the Shoshone Judgment Act, the jurisdiction of the tribal councils must be deemed to be the same as over other tribal lands within the exterior boundaries of the diminished portion of the reservation, and they may therefore regulate hunting and fishing on the restored lands. There would seem to be no basis for distinguishing between such lands and lands which have been formally designated as 'reservations' by Executive order, treaty, or act of Congress. An Indian reservation is simply a

part of the public domain set apart by proper authority for use and occupation by a group of Indians. *Forty-three Cases Cognac Brandy,* 14 Fed. 539 (C. C. D. Minn.). The United States holds the title, and the right of use and occupancy is in the Indians. This is precisely the state of the title under the Shoshone Judgment Act, since it provided that title is to be taken by the United States in trust for the Indians. It is true that the Shoshone Judgment Act does not expressly provide for the formal incorporation of the restored lands in the reservation, but no particular form of words is necessary to create a reservation. 'It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.' *Minnesota v. Hitchcock,* 185 U. S. 373, 390. See also *Spalding v. Chandler,* 160 U. S. 394; *Northern Pacific Railway Company v. Wismer,* 246 U. S. 283; *United States v. Payne,* 8 Fed. 883 (D. C. W. D. Ark.) In the *Wismer* case the court recognized as a reservation a tract of land that had been set aside for Indian occupancy by the Commissioner of Indian Affairs with the tacit approval only of the Secretary of the Interior rather than by an Executive order of the President. In the recent case of *United States v. McGowan,* 302 U. S. 535, the court applied the Federal Indian liquor laws to the Reno Indian Colony located on land purchased by the United States in order to settle the Indians upon them. The court held that it was immaterial that these lands were not designated as a 'reservation.'

"These cases establish that there is no peculiar virtue in the word 'reservation,' and that there is no magic formula nor special ceremony by which a 'reservation' must be conjured into existence. It is no more necessary to deposit a piece of parchment in the archives than to smoke a pipe of peace. To be sure, these cases do not establish that a reservation must necessarily be deemed to be created whenever the United States takes title to land in trust for In-

dians, or for their benefit. If the United States were to purchase isolated tracts for individual Indians, or a tract for a group of Indians who no longer maintained tribal relations, or were not subjected to the supervisory authority and guardianship of the United States, there might be no basis for contending that such lands constituted a reservation. Such is the purport of the decision in the case of *State vs. Shepard*, 300 N. W. 905 (Wisc.), in which the State Supreme Court held that various noncontiguous tracts, purchased for the Pottawatomie Indians by the United States were not reservation lands and that, therefore, a tribal Indian could be arrested for violating the conservation laws of the State. The Court distinguished the *McGowan* case on the ground that these Indians were not subject to the supervision of the United States. Assuming the validity of this distinction, the case is entirely in harmony with the current of authority.

"When, however, looking to what has been done, it can be perceived that lands have been set apart for Indian tribal use and occupancy, and that the Indians for whom the lands have been acquired are to come or to remain under the superintendence of the United States, such lands are not distinguishable from any other reservation lands. Certainly this is true of the lands acquired for the Shoshone Indians. The moneys with which they were to be purchased were appropriated by way of compensation to the Indians for the wrong they had suffered when their tribal use and occupancy had been disturbed. By directing that the lands were to be restored to 'tribal ownership,' Congress indicated that they were to be open to tribal use and occupancy. By providing for the consolidation of Indian lands in both the diminished and ceded portion of the reservation, Congress plainly indicated its intention of creating a solid reservation tract. A reservation so designed would, indeed, be superior to the checkerboarded reserva-

tions of other Indian tribes. Thus would needed lands be provided for the Shoshone Indians at the same time that the integrity of tribal life was restored. That such was the whole objective of the program appears clearly from the testimony of various representatives of the Indian Office before the Committee on Public Lands (Hearings, 77th Cong., 1st sess., pursuant to S. Res. 241, pp. 602 ff.)

"I can find no act of Congress, moreover, which is inconsistent with these general principles. Indeed, the act of February 14, 1923 (42 Stat. 1246, 25 U. S. C. sec. 335), provides that the provisions of the General Allotment Act, as amended, 'are extended to all lands heretofore purchased or which may be purchased by authority of Congress for the use and benefit of any individual Indian or band or tribe of Indians.' The Supreme Court has declared that the reference to Executive order reservations contained in section 1 of the General Allotment Act should be taken to confirm by implication the practice of establishing reservations by Executive order. *In re Wilson,* 140 U. S. 575; *United States v. Midwest Oil Company,* 236 U. S. 459; *Mason v. United States,* 260 U. S. 545. It may therefore be argued that by extending the provisions of the General Allotment Act to purchased lands the creation of reservations by purchase was sanctioned, at least when the purchase was specifically authorized by act of Congress. In any event, it could not be contended that, by subjecting purchased lands to the provisions of the General Allotment Act, Congress made the formal proclamation of a reservation, a *sine qua non* of reservation status.

"It is true that it is provided by section 4 of the act of March 3, 1927 (44 Stat. 1347, 25 U. S. C. sec. 398d), that 'changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not

be made except by Act of Congress:' but any change in the boundaries of the Shoshone Reservation will result in this case from an act of Congress, namely, the Shoshone Judgment Act itself. I see no reason for assuming that the act of March 3, 1927, contemplated that any change in the boundaries of a reservation must be expressly authorized by an act declaring *pro modo et forma* that the change may be made, and describing the new boundaries by metes and bounds. Congress must be deemed to have been aware of the doctrine that no special form or ceremony was necessary to create a reservation."

It will be noted that the foregoing official opinion of the Solicitor was written prior to the filing of the instant case. So far as counsel are aware it was written without any reference to, or knowledge of, the present controversy.

The Wyoming State officials charged with the administration of the state fish and game laws have cheerfully accepted the foregoing opinion of the Solicitor. Indeed its logic appears irrefutable. The purchased lands and the restored lands are again a part of the Wind River Reservation. Pursuant to its Constitutional duty and its Treaty obligation, the United States holds the title for the "absolute and undisturbed use" of the Indians.

8. Exemption vs. Immunity.

Petitioner repeatedly urges the point that since the Act of 1939 does not in words exempt the purchased lands from taxation such fact is an indication that no exemption was intended. This point is without merit. The immunity exists and a declaration thereof would have been surplusage. In the recent case of *Penn Dairies and*

the United States v. Milk Control Commission of Pennsylvania (1943), 318 U. S. 261, 87 L. ed. 748, this Court said:

> "We may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. Ohio v. Thomas, 173 U. S. 276, 43 L. ed. 699, 19 S. Ct. 453; Johnson v. Maryland, 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16; Hunt v. United States, 278 U. S. 96, 73 L. ed. 200, 49 S. Ct. 38; Arizona v. California, 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522."

In the case of *Johnson v. Maryland*, 254 U. S. 51, 65 L. ed. 126, cited in the Penn Dairies opinion, this Court, opinion by Mr. Justice Holmes, said:

> "Here is the question whether the state can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today."

CONCLUSION

It is respectfully submitted:

1. The Wind River Reservation is a Treaty Reservation.

2. The Constitution of the United States and the Treaty of 1868 are the Supreme Law of the Land applied to the instant controversy.

3. The purchased and restored lands, same being the lands involved in this cause, are a part of the tribal reservation.

4. Lands restored to the tribal reservation are immune from taxation just as are the lands which have never been separated from the tribal reservation.

5. The decision below is correct and the petition for writ of certiorari should be denied.

Respectfully,

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